

IN THE MATTER OF ARBITRATION BETWEEN

UNIVERSITY OF MINNESOTA

(Employer)

And

**MINNESOTA TEAMSTERS LOCAL 320
MINNEAPOLIS, MN**

(Union)

**DECISION AND AWARD
(Michelle Douglas suspension)
BMS CASE # 15 PA 0950**

ARBITRATOR:

JAMES N. ABELSEN

HEARING:

May 20, 2016

POST HEARING BRIEFS RECEIVED:

June 24, 2016

APPEARANCES:

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INTRODUCTION

This matter came on for hearing on May 20, 2016 at the offices of the University of Minnesota General Counsel in Minneapolis, Minnesota. The parties submitted post hearing briefs on June 24, 2016, at which time the record was closed.

The parties agreed that there were no procedural defects, no issues of arbitrability, and that this matter was properly before the arbitrator.

ISSUE PRESENTED

Both parties submitted separate but similar statements of the issue which combined is as follows: Did the Employer have just cause, as required by Article 11 of the Collective Bargaining Agreement, to impose upon the Grievant a one (1) day suspension without pay for failure to secure her keys at the end of her work shift?

RELEVANT FACTS AND BACKGROUND

The Union and Employer are parties to a Collective Bargaining Agreement covering the period of time July 1, 2013 through June 30, 2015. All facts, circumstances, and actions of the parties leading to this grievance occurred during the time this Agreement was in force.

The Grievant, Michelle Douglas, is a four (4) year employee of the University of Minnesota, and works as a Senior Building and Grounds worker / squad leader in the University's Facilities Management Department. She supervises several other employees, ensuring their assigned areas are properly maintained, and also has cleaning responsibilities of her own. The team's areas of responsibility include Appleby Hall, which is primarily an administrative office building, Vincent Hall, which houses mathematics, and Smith Hall, which houses the Chemistry Department, classrooms, laboratories and chemical storage.

On a normal work day, at the beginning of her shift the Grievant and her other team members punch in at the Mechanical Engineering (ME) building, take their keys from the secured lock box, receive a daily briefing from their supervisor and go about their assigned duties. At the end of the day the Grievant and her team members return their keys to the lock box in the ME building, punch out and leave for the day.

On Thursday, April 10, 2014, the Grievant had planned to complete her normal work day at 1:30 PM and from there go directly to a scheduled meeting with the funeral director who was handling arrangements for the funeral of the Grievant's aunt. The Grievant had an extremely close relationship with her aunt, almost a mother/daughter relationship, and was the family member primarily responsible for the funeral arrangements. She was, in her words, "not thinking clearly" that day and was distracted and preoccupied thinking of her responsibilities for the funeral.

Her work day on April 10th began as usual at 5:00 am. She picked up her keys at the ME building, where most campus keys are kept in a locked and secured area, and then began her normal routine. At 12:30 PM she finished her work at Appleby Hall and went to a scheduled staff meeting at the ME building. At the conclusion of that meeting at 1:30 PM, she went to punch out and leave for her appointment, and realized she had left her keys behind at Appleby Hall. She returned to Appleby, located the keys, and then, instead of returning the keys to the ME building (a 4 minute walk¹) and then going to the parking ramp (a 7 minute walk²) she went directly from Appleby to the parking ramp (an 11 minute walk³) so as not to be late for her appointment.

Realizing that failure to return keys to the secured lock box at the ME building was a violation of Policy,⁴ the Grievant called her supervisor early the next morning (the day of the funeral) to let her know she had the keys with her. Following the funeral the Grievant drove to the University and returned the keys to her supervisor, who was clearly unhappy that the keys had not been returned the previous day to the secured lock box.

On April 23, 2014 the Grievant was given a one (1) day suspension by her supervisor, who noted as the basis for the suspension that (a) the grievant was familiar with the University Policy on key security, (b) her actions in this case clearly violated that Policy, and (c) the grievant had been disciplined in the past for several Policy violations including a previous key security violation.⁵

¹ Walking route and time are from Union exhibit 21.

² Walking route and time are from Union exhibit 20.

³ Walking route and time are from Union exhibit 22.

⁴ University Services Employee Handbook on Security Guidelines provides that employees may be subject to discipline for negligent behaviors which include "failing to secure keys that have been issued in accordance with your position".

⁵ See Employer Exhibit 4.

On April 25, 2014, the Union filed a grievance on behalf of the Grievant alleging the Employer violated Article 11 of the Collective Bargaining Agreement by imposing this discipline without “just cause”.⁶

POSITION OF THE PARTIES

Employer’s Position

The University believes that for a number of reasons, its disciplinary action is appropriate and was imposed for just cause. First of all, the Grievant had received a prior written warning for failure to secure her keys. Specifically, in 2013 she failed to return her keys to the lock box at the end of her shift and instead asked a co-worker to return the keys for her. She was counseled regarding the expectations for handling keys and was told that future incidents of this nature could result in further discipline.

Then, less than a year later, as one aspect of this incident, she again failed to secure her keys by leaving them behind in the break room at Appleby Hall. That room is open to virtually all employees or anyone else who could enter a non-secured area in the building, which is why leaving the keys there, out of her control, is considered a violation of Policy.

When the Grievant went to punch out at the end of her shift she realized she had left the keys behind, and as noted, she punched out and returned to Appleby to retrieve the keys. But instead of returning the keys to the secured lock box in the ME building she kept the keys with her, went about her personal business, and waited until the next morning to advise her supervisor as to what happened.

The Employer notes that at the hearing the Grievant acknowledged (a) that she left the keys in the unattended room at Appleby Hall, (b) that she failed to return the keys to the secured lock box, (c) that she should not have taken the keys home with her, and (d) that her conduct violated the policies, procedures, and expectations regarding key security. In the eyes of the Employer, the fact that the Grievant explained that she was preoccupied and under personal stress did not excuse her conduct, particularly when she had been previously disciplined for a similar incident, and was well aware that her conduct was a violation of University policy.

⁶ See Union Exhibit 1.

In response to the Grievant's assertion that other employees had also engaged in similar conduct without being disciplined, the Employer not only disagreed with that assertion, but also noted that no evidence was offered to support that claim.

The Employer believes that their policies and procedures are reasonable, that the Grievant was aware of the key policies, that she had received a prior written warning for a similar offense, and was told that future violations could result in discipline, up to and including termination. The Grievant's state of mind was understandable but does not justify her actions, and therefore the discipline imposed was appropriate and for just cause.

Union's Position

The Union believes that the mitigating and aggravating factors which led to the Grievant's policy violation, and the fact that the Employer did not have "just cause" to discipline the Grievant, requires that the discipline be revoked and the Grievant made whole.

Mitigating and aggravating factors

The Union first argues that there are a number of specific mitigating circumstances which led to the Grievant's failure to properly secure her keys. On the day in question, the Grievant was consumed with thoughts about the upcoming funeral of her aunt and her responsibility in ensuring that the service went well. Her distraction with the funeral and the preparations she was responsible for caused her to inadvertently leave her keys in the break room at Appleby Hall. When she realized she had left the keys behind she immediately retrieved them, but because she was pressed for time to make her appointment with the funeral director she took the keys home instead of returning them to the lock box. Early the next morning she called her supervisor, told her what happened, and after the funeral she returned the keys. The Union believes these mitigating factors were inappropriately ignored by the Employer.

Absence of Just Cause to discipline

The Union also contends that the Employer has failed to meet what, to many, has become the recognized standard for imposing "just cause" discipline. That standard takes the form of a seven part test first articulated in 1964⁷ and which has been discussed, analyzed, and cited in numerous cases and awards ever since. In essence that test provides that if one answers "no" to

⁷ See Koven & Smith, Just Cause: The Seven Tests, (3rd ed. Revised by K. May, 2006) p.2.

any one of seven questions, then “just cause” has not been established or has at least been seriously weakened.

The Union contends that in this case at least four (4) of the seven (7) questions should be answered “no”.

The first involves the question of *Investigation*. This test requires that when conducting an investigation, an employer must give an employee a chance to explain. And an inherent part of giving a grievant a chance to explain means that any explanation offered must be considered (and not merely brushed off) before discipline is imposed (citing Koven & Smith, p. 165). Here, the investigation conducted by the Employer, and the Employer’s analysis and findings at each step of the grievance process make no mention of the Grievant’s distraction, and even refers to her absence as a “vacation”. This, they argue is strong evidence that the Employer simply “brushed off” the Grievant’s explanation.

The second involves *notice or lack of notice* of the consequences. Here the Union contends that (a) because the Grievant was distracted, and (b) because the keys were securely in her possession, and (c) because others had taken keys home in the past without being disciplined, she was essentially not on notice of the consequences of her actions.

The third is *equal treatment*. Throughout the proceedings the Union argued that others had violated the key policy and not been disciplined. Even though the Union was unable to find a witness willing to testify, for what they believed was fear of reprisal, they believe that the key security policies are unequally applied by the Employer. As evidence for that they note that even though the Associate Director for Facilities testified that he was unable to find a single instance where someone violated the policy and wasn’t disciplined, one or more supervisors acknowledged at the hearing that supervisors do not always ensure that keys are properly returned, which is their responsibility, and yet they have not been disciplined. This is strong evidence, argues the Union, that there is unequal enforcement of the key security guidelines.

The fourth question involves the *type and extent of any penalty*. This test generally requires that there be a reasonable proportionality between the offense and the penalty, and that the penalty must be reasonably calculated to eliminate or correct the offensive conduct. The Union believes that the penalty imposed in this case was not fair or reasonable in light of the Grievant’s state of mind, and because she protected the security of the facilities by retrieving the keys and safely keeping them in her possession. Because she was aware of the policy, and

violated that policy only because of her state of mind that day, a penalty of suspension does no good, is punitive in nature, and in no way is “reasonably calculated to eliminate or correct the offensive conduct.”

For these reasons argues the Union, the penalty of a one-day suspension without regard to the extenuating circumstances is unreasonable, disproportionate to the offense, and unfair.

DISCUSSION AND ANALYSIS

Employer’s Key Security Policy, and Grievant’s Awareness of the Policy

In order to help ensure the safety and security of the Employer’s facilities, the University’s Facilities and Management Department has developed policies and procedures regarding the security of building keys. If a key is lost or stolen, building security is compromised. And if the key is a building master key, then all the locks in the building must be re-keyed at considerable cost and inconvenience. This key security policy is set out in the University Employee Handbook and specifically provides that “failing to secure keys that have been issued in accordance with your position” is an example of employee behavior that can result in disciplinary action.

In addition to receiving a copy of the Handbook, custodians receive additional, more specific instruction on the handling of keys during their orientation and during regular department and employee meetings. Testimony indicated that the Grievant received the same information and instruction as the other custodial staff and, in particular, her supervisor testified that when the new Handbook came out in 2013 the Grievant received a copy of that book and acknowledged her responsibility to follow those policies.

In a separate unrelated incident in September, 2013, the Grievant failed to return her keys to the secured lock box at the end of her shift, and instead asked a co-worker to return the keys for her. Following that incident the Grievant was counseled by her supervisor regarding the requirements for key handling and received a written warning that future violations could result in further discipline.⁸ Less than seven months later this key incident occurred.

In that the policy is clear, and the Grievant was well aware of the Policy through training and counseling, and had recently been warned about an earlier similar violation, there is ample

⁸ Employer’s Exhibit 2

evidence that in the absence of some extenuating circumstances, some disciplinary action by the Employer was appropriate.

Consideration of Extenuating Circumstances

On the day in question, the Grievant reported to work at the beginning of her work shift, punched in, and began her work day. It was, in her words, a particularly stressful day. She was dealing with the death of her aunt, who she took care of and was extremely close to. She was the family member primarily responsible for the upcoming funeral arrangements and was scheduled to meet with the funeral director shortly after work to prepare for the funeral the next day. She testified that she was not thinking clearly that day and was preoccupied thinking of all she had to do.

Prior to punching out at the end of her shift the Grievant attended a staff meeting at the ME building. After the meeting she went to punch out and realized that she had left her keys in Appleby Hall, the last area she worked in that day. Pressed for time and distracted with her upcoming appointment, she returned to Appleby, retrieved her keys and walked directly from Appleby to the parking ramp, (an eleven (11) minute walk) and left for her appointment.

It appears from the evidence that another option for the Grievant was to retrieve her keys from Appleby, return to the ME building (a four (4) minute walk) to properly replace her keys in the lock box, and from there, walk to the parking lot (a seven (7) minute walk. In either case the time it took to walk would be about the same, and the only additional time it might take to return the keys is the time it would take to enter the ME building, replace the keys in the secured lock box, and exit the building.⁹

The next morning the Grievant called her supervisor to let her know she had taken the keys home with her and would return them later that day after the funeral. By the time that call was made, the Grievant's supervisor was aware that the keys had not been returned, having heard from the Grievant's co-workers that the Grievant told them she thought she had lost her keys.¹⁰ After the funeral the Grievant went to the ME building and gave the keys to her supervisor, who was visibly upset.

⁹ Union Exhibits 20, 21, and 22.

¹⁰ Employer's Exhibit 4 and supervisor's testimony.

The Union argues that the principle of Just Cause requires that an Employer give individualized consideration to specific mitigating factors that are advanced by an Employee to explain their actions or failures. (In Re Salem-Keizer School Dist and Salem-Keizer Assn of Classified Employees, 128 LA 1404, 1417). Here, the Grievant was distracted by her personal loss and her responsibilities for the upcoming funeral, and did not intend to leave without securing her keys. And yet throughout the grievance process the Employer never mentioned the Grievant's state of mind or any extenuating circumstances which caused the Grievant to act as she did. This failure of the Employer to consider these mitigating circumstances is a basis, argues the Union, for vacating the suspension.

While it is true that there is little in the Employer's records that refers to the Grievant's state of mind, that is not necessarily an indication that those who heard the grievance through the various steps ignored her state of mind or her circumstances in their decision making. They may well have seriously considered her situation and simply concluded that being upset or distracted did not justify ignoring a clear rule. Or, they may have concluded that her situation was not significantly different than the normal pressures and disappointments that most people encounter at various times in their lives. Or, they may have concluded that if the situation was so distracting, the Grievant had the option to take more vacation time.

So while there is no record or known discussion of what the Employer was thinking, there is also no indication that they did not take the Grievant's stressful day and distracted state of mind into consideration, but simply concluded that the Grievant's state of mind that day did not excuse her failure to adhere to an important and well known requirement of the job.

Was the Discipline for Just Cause?

Thoroughness of the Investigation

One requirement of the seven part test commonly considered in determining "Just Cause", is that "when conducting a proper disciplinary investigation, an inherent part of giving a grievant a chance to explain means that any explanation offered must be considered (and not merely brushed off) before discipline is imposed". (See Koven & Smith, Just Cause: the Seven Tests, p.2 2nd Ed., 1996)

In this case, argues the Union, the Employer never mentioned in its suspension letter, the Grievant's state of mind or the fact that she was distracted and late for her meeting with the

funeral director, and they never responded to the Union's argument that that was the cause of the Grievant taking her keys home with her. This, they believe is evidence that the Employer simply "brushed off" the Grievant's explanation.

It is true that the Employer's suspension letter did not mention the Grievant's state of mind. However, In the Employer's step 3 grievance response it is noted that "Ms. Douglas was distracted during this time" (see Union Ex 13). Granted, it is only mentioned once, however the lack of a detailed discussion by the Employer does not necessarily lead to the conclusion that the Employer brushed off her explanation. There were at least three steps in the process where the Grievant had a chance to fully explain, and three different Employer representatives or groups heard and considered the explanation. And just because the grievance was denied at each step, that again is no indication that her explanation was brushed off. It apparently was not convincing, and it apparently was not considered as justification for ignoring the policy, but it was heard and considered at three different steps in the grievance process.

Notice of possible consequences

The Union contends that because the Grievant was in a distracted state of mind, and because the keys were safely in her possession, she was essentially unaware that she would be disciplined for taking the keys home with her.

The fact that someone is distracted, or under stress, or not thinking clearly is perhaps an explanation for certain behavior, and it may very well be that many policy violations are committed because someone is distracted or under stress. But every life is filled with distractions, and every job, every relationship, and virtually every person's day can involve some level of stress. But everyone who has a job with responsibilities has to put those things aside, or otherwise learn to deal with them in order to fulfill their job responsibilities. To give every policy violator a pass because they were stressed or distracted would make virtually all policies or rules unenforceable, since anyone, at any time can point to one or more stressors or distractors in their life as the cause of their behavior. So the distraction argument is an explanation but not an exculpation.

Equal treatment of policy violators

The fact that the Grievant thought others had taken keys home without being disciplined was also advanced as an argument that the Grievant was not on notice that she would be

disciplined; especially since the keys were in her possession and she had called her supervisor to let her know. That argument is certainly not without merit since the reason for the policy is security, and the keys were securely with the Grievant – at least after she retrieved them from Appleby.

The concern though, is that taking keys home was known by the Grievant as a policy violation, and no evidence was found by the Employer, nor was any evidence presented by the Union to corroborate their claim that this was not an uncommon occurrence. The fact that there was no evidence that others have taken keys home is not to say however, that it never happened. With hundreds of employees using keys it is inconceivable that keys have never been taken home, either intentionally or by mistake. And it is inconceivable that every violation is discovered. So it would be safe to assume, as the Union argues, that others have done it without being disciplined. But the point of the equal treatment requirement is not that other people may have violated the policy and not been disciplined. The point is that this was a clear violation which was brought to the attention of management, and this Grievant had another recent key policy violation for which she was disciplined. And there is no indication that there were others with a record similar to hers who had received more favorable treatment.

Appropriateness of the Penalty

The Union next argues that just cause discipline “requires reasonable proportionality between the offense and the penalty” and that “once the misconduct has been proved, the penalty imposed must be fairly warranted and reasonably calculated to eliminate or correct the offensive conduct”. (citing *Discipline and Discharge in Arbitration* 65 (BNA, 2008); and *Capital Airlines Inc.*, 25 LA 13,16 (1955)).

The essence of that argument is that first of all, a one day suspension is disproportional to the offense of taking the keys home with her, since the keys were at all times fully secured. And secondly, the penalty imposed will not correct this kind of misconduct because the Grievant knew at the time that it was a violation, but her state of mind was such that she was focused only on her personal loss and the upcoming funeral arrangements.

There is no dispute that the Grievant was distraught and distracted that day, and for good reason. But life happens, and the Grievant was able to prepare for the funeral, put in her work day, attend a staff meeting, realize she had left her keys behind, knew where she left them, and knew she had to retrieve them. So being distraught and preoccupied did not affect her ability to

function or think or decide. She functioned perfectly well throughout the day, and even though she was distraught she made choices all day. And one of the choices was to retrieve her keys from Appleby Hall and walk directly to the parking lot (which took 11 minutes) and leave for an appointment, instead of retrieving her keys, returning them to the lock box and then walking to the parking lot (which would also take 11 minutes). In a day full of responsibility, with decisions and choices that were successfully made, this decision to keep the keys was simply a bad decision.

FINDINGS

1. The Employer's policy on key security is clearly spelled out in the Employee Handbook, and is based on the organization's need for safety and security and to avoid the considerable cost and disruption of replacing keys. That policy and the consequences of violating that policy were well known by the Grievant. It was covered in orientation, at her annual review, at the time the new employee handbook was issued, and more specifically because she had violated the policy less than a year previously and had been given a written warning of the possible consequences of a future violation.
2. The Grievant was responsible for the funeral arrangements for her aunt, who had been like a mother to her and who had recently passed away. On the day in question she was feeling particularly stressed, distracted, and not thinking clearly because of all she had to do. Nevertheless, she arrived for work on time, fulfilled her work responsibilities, attended a scheduled employee meeting, punched out after her shift, realized she had misplaced her keys, and retrieved them. So even though she was upset and distracted she was able to function appropriately throughout the day.
3. Keeping her keys with her was not the Grievant's only option. Instead of punching out at the ME building, walking to Appleby Hall where she had left her keys, and then going directly to the parking ramp (an 11 minute walk), she could have gone to Appleby Hall, returned to the ME building (a 4 minute walk), secured the keys, and walked from there to the parking ramp (a 7 minute walk). In either case the walking


time was approximately 11 minutes, so failing to return to the ME building and secure the keys saved virtually no time. Additionally, if she felt she was going to be late for her appointment she could have called the funeral director and explained she might be late.

4. The Grievant's decision to keep the keys with her instead of returning them to the secured lock box was not a matter of being distracted. She was aware enough to retrieve the keys, but she then made a conscious choice to violate a policy for which she had previously been disciplined just to be on time for an appointment with a funeral director.
5. The Collective Bargaining Agreement between the parties requires that discipline of employees must be "...for just cause only". In this case the Employer's decision to impose a one day suspension was for just cause in that they articulated a legitimate non-discriminatory reason for the suspension, they supported that reason with convincing evidence, and the decision was fair and appropriate in that particular situation, and in light of all the facts and circumstances surrounding the incident which led to the suspension.

DECISION AND AWARD

Based on the record as a whole and for the reasons cited herein, the grievance is denied.

Date: July 21, , 2016


James N. Abelsen, Arbitrator